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BILATERAL INVESTMENT TREATY WITH PANAMA AND BUSINESS AND ECONOMIC RELATIONS TREATY WITH POLAND

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Mr. PELL, from the Committee on Foreign Relations, submitted the following

REPORT

[To accompany Treaty Doc. 99-14 and Treaty Doc. 101-18]

The Committee on Foreign Relations, to which was referred the Treaty Between the United States of America and the Republic of Panama concerning the Treatment and Protection of Investments, with agreed minutes, signed at Washington, October 27, 1982 and the Treaty Between the United States of America and the Republic of Poland concerning Business and Economic Relations with protocol and four related exchanges of letters, signed March 21, 1990, at Washington, having considered the same, reports favorably thereon without amendment and recommends that the Senate give its advice and consent to ratification thereof.

PURPOSE

The principal purpose of the Bilateral Investment Treaty with Panama and the Business and Economic Relations Treaty with Poland is to encourage and protect U.S. investment in those countries.

MAJOR PROVISIONS

The treaties' major provisions provide the following:

—The better of national or most-favored-nation treatment, for each party to the treaty, thereby providing in the case of U.S. companies a "level playing field" in competing with national and third-country investors;

—International law standards for expropriation and for payment of prompt and fair compensation;

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—Guaranteed access to foreign exchange and the right to repatriate capital except under emergency situations; and

—Access to international arbitration for settlement of investment disputes.

Bilateral Investment Treaty Program

The earliest formal economic treaties that the United States negotiated with other countries were a series of Friendship, Commerce, and Navigation (FCN) Treaties. These treaties set the framework for U.S. trade and investment relations with foreign countries.

With the advent of the General Agreement on Tariffs and Trade (GATT) in 1948, U.S. trade relations began to be set with foreign countries through multilateral trade agreements and the use of FCN treaties faded. The last two FCN's were negotiated in the late 1960's. However, this left a gap in relations with foreign countries involving U.S. investment abroad, since investment matters are currently outside the scope of GATT, although the United States has included investment issues in the ongoing Uruguay trade negotiations.

In an attempt to promote the free flow of investment internationally, in the absence of multilaterally agreed to rules, the United States began, in 1981, to negotiate a new series of treaties called Bilateral Investment Treaties (BIT's). The BIT's are therefore the modern successor to the investment side of the Friendship, Commerce, and Navigation Treaty series.

Model Treaty Basis of Negotiations

Before entering into negotiations, the United States developed a model treaty which sought to incorporate provisions which would facilitate the free flow of investment, prohibit practices which have emerged in various countries which inhibit that free flow, and generally codify rules on investment and dispute settlement, which the United States views as well established international law and precedent. Specifically, the model treaty seeks to achieve the following objectives:

—foreign investments are to be accorded treatment in accordance with international law and are to be treated no less favorably than investors of the host country or no less favorably than investors of third countries, whichever is the most favorable treatment, ("national" or "most-favored-nation" treatment) subject to certain specified exceptions;

—international law standards shall apply to the expropriation of investment and to the payment of compensation for expropriation;

—free transfers shall be accorded to funds associated with an investment into and out of the host country; and

—procedures are to be established which allow an investor to take a dispute with a party directly to binding third-party arbitration.

The proposed treaty with Panama generally satisfies the four major objectives contained in the model treaty.

Bilateral Treaty Program Extended to Eastern Europe

The administration, to facilitate the continuation of economic and political changes which have taken place over the last 2 years in Eastern and Central Europe, has sought to extend the Bilateral Investment Treaty Program to eligible countries in Eastern Europe. The first treaty to be concluded pursuant to that effort is with Poland. The stated purpose of this proposed treaty with Poland is "to stimulate the growth of the private sector and of market institutions * * * consistent with the economic reform programs adopted by that government."

The proposed treaty with Poland contains a number of provisions which should improve the prospects for United States investments there. Among these are provisions which:

—recognize the prompt, adequate, and effective international law standards of compensation for expropriation;

—provide for international arbitration of disputes between the investor and the Government;

—provide for free transfer of funds associated with investments after a 4-year phase-in period beginning in 1992;

—guarantee that U.S. investors receive nondiscriminatory treatment with respect to certain procedural matters related to the conduct of their business; and

—provide extensive protections for intellectual property rights.

Committee Action

On March 25, 1986, President Reagan transmitted the Bilateral Investment Treaty with Panama (Treaty Doc. 99–14) to the Senate for advice and consent to ratification. On June 19, 1990, President Bush transmitted the Business and Economic Relations Treaty with Poland (Treaty Doc. 101–18) to the Senate. These treaties were referred to the Committee on Foreign Relations for consideration.

On August 11, 1986, the committee held a public hearing on the Panama treaty. No other action was taken in the 99th Congress. On August 9, 1988, the committee held a second hearing on the Panama treaty. No further action was taken on the Panama treaty during the 100th Congress as a signal of the displeasure of the Senate with the Panamanian Government, then controlled by Gen. Manuel Noriega. On September 18, 1990, the committee held a hearing on the two treaties and received testimony from Assistant Secretary of State for Economic and Business Affairs Eugene McAllister in support of U.S. ratification. On September 14, 1990, the committee recommended that the Senate give its advice and consent to the treaties.

Entry Into Force

The treaties with Panama and Poland will enter into force 30 days after the date of exchange of instruments of ratification; remain in force for a period of 10 years; and shall continue in force after that period, until such time as either party gives 1 year's written notice of its intention to terminate at the end of the 10th year, or any time thereafter. Upon termination of the treaty, all of

the provisions of the treaty, except for the entry into force provision, continue in effect for an additional 10 years with respect to any investments which have been made or acquired prior to the date of termination.

Description of Treaties' Provisions

Preamble

The preamble describes the broad goals each party wishes to achieve in entering into these treaties.

ARTICLE I—DEFINITIONS

Article I defines the terms used elsewhere in the treaties.

ARTICLE II—ENCOURAGEMENT AND PROMOTION OF INVESTMENTS

Article II describes the obligations of each party with respect to the treatment of investments of the other party.

ARTICLE III—TREATMENT OF FOREIGN NATIONALS AND COMPANIES (PANAMA TREATY)

Article III provides for nationals and companies of each party to carry out business activities of the other and for foreign companies to hire top managerial personnel without regard to nationality.

ARTICLE III—BUSINESS FACILITATION AND BUSINESS RIGHTS (POLAND TREATY)

Article III provides for nondiscriminatory treatment for purposes of conducting investment activities conducted by nationals of the other party subject to a list of exceptions enumerated by each party in a separate annex to the treaty. Certain rights related to the staffing of investments and commercial activities are also spelled out in this article.

ARTICLE IV—COMPENSATION FOR EXPROPRIATION (PANAMA TREATY)

Article IV prohibits the expropriation or nationalization of investments owned by nationals of the other party, except for a public purpose and in accordance with due process of law. It also provides for prompt, adequate, and effective compensation for expropriations which legally take place.

This appears as article VII in the Poland treaty.

ARTICLE IV—PROTECTION OF INTELLECTUAL PROPERTY (POLAND TREATY)

Article IV contains extensive protections for intellectual property rights. This provision has not been included in previous bilateral investment treaties.

ARTICLE V—COMPENSATION FOR DAMAGES DUE TO WAR AND SIMILAR EVENTS (PANAMA TREATY)

Article V specifies that the treatment each party will accord to the investments owned by nationals of the other party, in cases of damages to such investments due to armed conflict, insurrection,

state of national emergency, riot or terrorism shall be no less favorable than nationals or companies of such other party, or nationals or companies of a third country, whichever is more favorable.

ARTICLE VI—TRANSFERS (PANAMA TREATY)

Article VI defines the obligations of each party with respect to permitting free transfers of funds related to investments.

This provision appears as article V in Poland treaty. However, in a protocol to the treaty, the free transfer of profits is phased-in through 1995.

ARTICLE VII—SETTLEMENT OF LEGAL INVESTMENT DISPUTES BETWEEN ONE PARTY AND A NATIONAL OR COMPANY OF THE OTHER PARTY (PANAMA TREATY)

Article VII defines the meaning of investment disputes for purposes of the treaty. It also outlines procedures for settlement of investment disputes, including settlement by conciliation or binding arbitration. This article specifically exempts issues related to the U.S. Export-Import Bank and other official credits, guarantees, and insurance from the application of this article.

This provision appears as article IX (and article XI with respect to the exemption of official transactions from coverage) in the Poland treaty.

ARTICLE VIII—SETTLEMENT OF DISPUTES BETWEEN THE PARTIES CONCERNING INTERPRETATION OR APPLICATION OF THE TREATIES (PANAMA TREATY)

Article VIII establishes the procedures for settlement of disputes concerning the interpretation and application of provisions of the treaty between treaty parties. It also establishes a mechanism for either party to request consultations concerning the interpretation or application of the treaty and to resolve any disputes related thereto. Article VIII specifically exempts issues related to the U.S. Export-Import Bank and other official credits, guarantees, and insurance from the application of this article.

This provision appears as article X (and article XI with respect to the exemption of official transactions from coverage) in the Poland treaty.

ARTICLE VIII—EXCHANGE OF INFORMATION AND TRANSPARENCY (POLAND TREATY)

Article VIII acknowledges the desirability of facilitating the collection and exchange of nonconfidential information relating to investments and commercial activities. It also provides for such information to be publicly available as well as any laws, regulations or administrative practices or procedures relevant to such activities.

This provision is not contained in the Panama treaty.

ARTICLE IX—RESERVATION OF RIGHTS (PANAMA TREATY)

Article IX preserves the laws, regulations, and administrative practices and procedures of both parties, notwithstanding the treaty.

This provision appears as article XII in the Poland treaty.

ARTICLE X—MEASURES NOT PRECLUDED BY THE TREATY (PANAMA TREATY)

Article X reserves the right of each party to take all measures necessary for the maintenance of public order, fulfillment of its existing international obligations, and protection of its own security interests.

This provision is incorporated into article XII of the Poland treaty.

ARTICLE XI—TAXATION (PANAMA TREATY)

Article XI limits the scope of the treaty with respect to taxation matters.

This provision is not included in the Poland treaty.

ARTICLE XII—APPLICATION OF TREATIES TO POLITICAL OR ADMINISTRATIVE SUBDIVISIONS OF THE PARTIES (PANAMA TREATY)

Article XII provides for the application of the treaty to the parties' political or administrative subdivisions.

This provision appears as article XIII in the Poland treaty.

ARTICLE XIII—ENTRY INTO FORCE AND DURATION AND TERMINATION (PANAMA TREATY)

Article XIII provides for the entry into force of the treaty 30 days after the exchange of instruments of ratification; for it to remain in force for 10 years before either party can terminate; and for investments undertaken prior to termination to be afforded protections equivalent to the treaty protections for an additional 10 years.

This provision appears as article XIV in the Poland treaty.

Annex

The annex provides, in accordance with article II, of the treaties, the sectors which each party exempts or limits from national treatment with respect to investments of the other party.

PROTOCOL (POLAND TREATY)

The protocol to the Polish treaty specifies the phase-in formula for the free transfer of profits by 1995. The protocol also includes two exchanges of letters (1) dealing with designation of a Deputy President of the Polish Agency for Foreign Investments to assist U.S. investors and (2) with the conduct of tourism and travel related activities by nationals of the parties.

ANNEX 1 (POLAND TREATY)

Annex 1 of the treaty details what the Polish Government defines as adequate and effective protection of patents.

ANNEX 2 (POLAND TREATY)

Annex 2 of the treaty provides for the protection of integrated circuit layout designs and defines what the Polish Government means by "protection."

ANNEX 3 (POLAND TREATY)

Annex 3 of the treaty provides for adequate and effective protection for proprietary information and defines what is meant by such protection.

EXCHANGE OF LETTERS (POLAND TREATY)

A final exchange of letters clarifies the provisions of article II of the treaty relating to entry of investments by nationals of the other party.

RESOLUTIONS OF RATIFICATION

PANAMA

Resolved, (two-thirds of the Senators present concurring therein), That the Senate advise and consent to ratification of the Treaty between the United States of America and the Republic of Panama Concerning the Treatment and Protection of Investments, with agreed minutes, signed at Washington, October 27, 1982 (Treaty Doc. 99-14).

POLAND

Resolved, (two-thirds of the Senators present concurring therein), That the Senate advise and consent to ratification of the Treaty between the United States of America and the Republic of Poland Concerning Business and Economic Relations with Protocol and Four Related Exchanges of Letters, signed March 21, 1990, at Washington (Treaty Doc. 101-18).

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